# *for The Defense*

The Training Newsletter for the Maricopa County Public Defender's Office

Volume 2, Issue 7 -- July 1992

Dean W. Trebesch, Maricopa County Public Defender


**Contents:**



## INVOKING THE FIFTH: CONFRONTING THE RELUCTANT DEFENSE WITNESS

**By Lawrence S. Matthew**

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself". Art. II, Sec. 10 of the Arizona Constitution likewise provides that "[n]o person shall be compelled in any criminal case to give evidence against himself . . . ."

Anyone who has been doing criminal trials for any length of time has come across a witness whose testimony is important, but who refuses to testify and, in so doing, invokes the Fifth Amendment privilege against self-incrimination. (Hereafter, "the privilege".)

**As in any court proceeding, a full and detailed record is necessary to protect an accused's rights on appeal.**

Unfortunately, a defendant's desire for a witness to testify does not supersede the witness's right to assert the privilege. State v. Fisher, 141 Ariz. 227, 243, 686 P.2d 750, 766 (1983).

If counsel is aware that a defense witness will or may invoke the privilege during trial, counsel should request a pretrial hearing so that a determination may be made as to whether the witness may validly invoke the privilege. It will be for the court, not the witness, to determine whether the witness's invocation is justified.

As in any court proceeding, a full and detailed record is necessary to protect an accused's rights on appeal. As the privilege is personal in nature and may only be asserted by the person who holds it, it is important to get the witness himself to assert the privilege on the record. If possible, counsel should attempt to get the witness to assert the privilege for each question counsel intends to ask.

### Validly Asserting The Privilege

An assertion of the privilege is not valid if based upon a fear of something other than criminal prosecution. See, e.g., State v. Armstrong, 6 Ariz. App. 139, 430 P.2d 718 (App. 1967) (assertion of privilege may not be based upon fear of retribution).

The scope of the privilege includes "statements which may only tend to incriminate by furnishing one link in the chain of evidence required to convict". Flagler v. Derickson, 134 Ariz. 229, 231, 655 P.2d 349, 351 (1982) (emphasis in original). In order to find the privilege properly invoked, the court must determine that the witness apprehends "a real and appreciable danger of prosecution". Id. The court's determination must be made after taking into consideration the circumstances of the case, the nature of the testimony the witness has been called to provide and what the witness's answers may conceivably reveal. Id. at 232, 655 P.2d at 352.

To determine whether there is "a real and appreciable danger of prosecution" arising from the events the witness is reluctant to testify about, counsel should determine whether prosecution of the witness may be barred. While the privilege will continue to exist while a criminal action is on appeal, no privilege exists once the appeal ends and the conviction becomes final. State v. Gretzler, 126 Ariz. 60, 88, 612 P.2d 1023, 1051 (1980); see, also, State v. Verdugo, 124 Ariz. 91, 602 P.2d 472 (1979).

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Likewise, no privilege exists if prosecution is barred due to (1) an acquittal; (2) the witness has received a pardon; or (3) the statute of limitations has run. M. Udall and J. Livermore, Law of Evidence Sec. 77 at p. 154 (3d ed. 1991).

Another bar to prosecution exists when a witness has been granted immunity. Unfortunately, when a witness asserts the privilege, the defendant has no right to compel the state to grant the witness immunity. A.R.S. Sec. 13-4064; State v. Axley, 132 Ariz. 383, 388, 646 P.2d 268, 273 (1982).

Where the state, however, refuses to grant immunity to a paid informant and the testimony of the informant is necessary for a determination of guilt or innocence, a violation of due process occurs. The state's ability to obtain a conviction "cannot hinge on the gossamer thread of the criminal involvement of its own agent and his willingness to testify". State v. Cornejo, 139 Ariz. 204, 208, 677 P.2d 1312, 1316 (App. 1983).

**Should the witness invoke the privilege as a result of prosecutorial interference, make a record detailing the nature of the statements or threats and the circumstances surrounding their communication to the witness.**

Invoking The Privilege Before The Jury

So what happens when a court determines that a witness is validly asserting the privilege? May the witness be called to the stand? Under the old approach, courts used to permit the accused to call the witness to the stand and have the witness invoke the privilege in front of the jury. The reasoning behind this was that an accused has a Sixth Amendment right to show the jury that he has presented "all the relevant evidence at [his] disposal." State v. Ortiz, 113 Ariz. 60, 61, 546 P.2d 796, 797 (1976).

This is no longer the rule. It is now well-established that a jury is not entitled to draw any inferences from a witness's assertion of the privilege. State v. McDaniel, 136 Ariz. 188, 194, 665 P.2d 70, 76 (1983). Thus, when a witness legitimately refuses to answer all relevant questions, trial courts invariably refuse to permit the accused to call the witness at all.

It must be remembered, however, that the trial court does have discretion to force a witness to invoke the privilege in front of the jury when the possibility exists that the witness will not assert the privilege or will answer some questions and not others. See, State v. Corrales, 138 Ariz. 583, 588, 676 P.2d 615, 620 (1983).

If the witness will testify at all, the accused has a right to present relevant testimony and must be provided a reasonable opportunity to "test whether that testimony will be forthcoming, and if not, whether it can be compelled." Id. (Quoting, United States v. Mayes, 512 F.2d 637, 649 (6th Cir.), cert. denied, 422 U.S. 1008 (1975)).

Thus, a witness's invocation of the privilege may take place before the jury when the court finds "some valid purpose" will be served. Corrales at 588. The court may refuse to allow the witness to be called if it finds the interests of the person calling the witness are outweighed by the danger of prejudice that may result from inferences the jury might draw from the assertion of the privilege. Id.

In Corrales, the trial court ruled that the privilege was not being validly relied upon by the witness and ordered the witness to testify or be held in contempt. The trial court permitted the witness to be placed on the stand in front of the jury in order to see if the witness's expressed intention of invoking the privilege would survive the court's admonition to testify. Based upon these facts, the Arizona Supreme Court held the actions of the trial court to be proper. Id. at 589, 676 P.2d at 621.

Getting The Evidence To The Jury

When the court refuses to permit the witness to testify, either to all matters or some matters due to the witness's intention to invoke the privilege, the question then becomes: Is there any other way to get the evidence before the jury?

When a court rules that a witness has properly invoked the privilege, the witness is unavailable. Aside from being literally unavailable, the witness is also legally unavailable. Rule 804(a)(1), Arizona Rules of Evidence. The Rules of Evidence provide for several exceptions to the hearsay rule when a "declarant" is unavailable and thus provide a potential avenue to get the desired evidence before the jury. Among those exceptions that should receive special attention when a defense witness becomes unavailable by asserting the privilege are the following:

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**FOR THE DEFENSE** is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. **FOR THE DEFENSE** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

(1) Rule 804(b)(1) permits the court to receive former testimony of an unavailable witness as long as the party against whom the testimony is offered had an opportunity and similar motive when previously examining the witness.

(2) Rule 804(b)(3) provides a hearsay exception for statements against interest made by an unavailable witness. If the statements sought to be introduced expose the declarant to criminal liability while at the same time exculpating the accused, the rule requires the existence of corroborating circumstances which are indicative of the trustworthiness of the statement.

In order to determine trustworthiness, the Arizona Supreme Court has directed trial courts to examine evidence both corroborating and contradicting the statements. If the trial court concludes that a reasonable person could find the statement to be true, the statement is admissible. State v. LaGrand, 153 Ariz. 21, 27-28, 734 P.2d 563, 569-70 (1987), cert. denied, 484 U.S. 872, 108 S. Ct. 207 (1987); Cf. State v. Mejias, 163 Ariz. 531, 789 P.2d 398 (App. 1990), (because of the nature of the case, there was no corroborative or contradictory evidence to examine).

(3) Rule 804(b)(5), the so-called "catchall" exception should be considered if all else fails. Aside from requiring circumstantial guarantees of trustworthiness, the rule requires (1) that the statement offered is evidence of a material fact; (2) the statement is more probative than any other evidence available; (3) the interests of justice will be served by admitting the statement; and (4) the opposing party must have been made aware, in advance of the proceedings, of the nature of the statement and counsel's intention to offer it.

It should be remembered, however, that before attempting to determine whether an exception to the hearsay rule is applicable to the evidence sought to be introduced, the evidence should be examined to determine whether it is actually hearsay or whether it is being used for a purpose other than to prove the truth of the matter asserted. (E.g., such as evidence of a state of mind).

Invocation Of The Privilege As A Result Of Prosecutorial Or Judicial Interference

In certain instances, a defense witness's invocation of the privilege will occur as the result of an admonition by the court or the prosecutor concerning the potential danger of self-incrimination or perjury. There is no per se prohibition against such action, but that does not mean it is always proper. Such admonitions may very well violate the accused's right to present evidence.

In order to determine whether a violation of the accused's rights has occurred, the facts and circumstances surrounding the admonition must be examined. Consider whether the admonition was coercive, lengthy or gratuitous in nature. Was the admonition given repeatedly? Was it given in a threatening manner? Is the timing of the admonition suspect?

The leading case on judicial interference is Webb v. Texas, 409 U.S. 95, 93 S. Ct. 351 (1972), where the United States Supreme Court found a judge's "threatening remarks . . . effectively drove [the] witness off the stand". Id. at 98, 93 S. Ct. at 353. For cases regarding prosecutorial interference, see the cases collected in the annotation at 88 A.L.R. 4th 388 (1991).

Should the witness invoke the privilege as a result of prosecutorial or judicial interference, make a record detailing the nature of the statements or threats and the circumstances surrounding their communication to the witness. The record should also clearly show that the witness's invocation of the privilege occurred as a direct result of judicial or prosecutorial action. Finally, an offer of proof should be made regarding what the witness's testimony would have been had the witness testified.

Opening Statement: A Caution

If any question involving the witness's availability has not been settled prior to opening statement, counsel would be well-advised not to raise the content of the witness's anticipated testimony during opening statement. To do otherwise, counsel runs the risk of not being able to provide the jury with evidence promised during opening statement. As a result, the jury may infer that the existence of the witness or evidence was concocted by you or your client.

For this reason, every effort should be made to settle the question before trial. If, for whatever reason, the question is not settled before trial, this may be one of those rare instances where counsel may want to consider waiving opening statement until the conclusion of the state's case. By that time, hopefully, the question will be resolved.

## Influencing Sentencing Decisions

**By Diane J. Terribile**

In a great majority of cases, the sentencing phase is as important as any other proceeding in the criminal court process, up to and including the trial. Unfortunately, it is also that phase which is most likely to be overlooked. Defense attorneys may perceive that prosecutors, judges, and probation officers have all the discretion and that they have little impact on sentencing decisions. They may overlook the extent to which they can influence the opinions of other players.

In reality, skilled and well-prepared defense attorneys can affect the sentence imposed. Attorneys who achieve the greatest success view their function at sentencing as a extension of their role as advocates. They are attorneys who are successful at developing, creating, and communicating mitigation.

Of the entire sentencing process, the presentence investigation is one of the most important components. In fact, the National Center on Institutions and Alternatives reports that 85% of all presentence recommendations are accepted by the courts. The need for an attorney to supply input at this phase cannot be overemphasized. This astonishing figure emphasizes the necessity for attorneys to be prepared and to prepare their clients for the presentence investigation.

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Attorneys who wish to influence sentencing by persuading others of the merits of their position, should not wait to be contacted for comments. Severe economic conditions have forced the County Adult Probation Department to find new ways to maximize their efficiency. As a result, they have developed a condensed version of the presentence report and eliminated or modified several practices that were formerly required. One significant practice that was abolished was the requirement that P.O.'s contact attorneys in cases involving trials or when they intend to recommend against a plea agreement. Their new practice is to "initiate contact when the presentence officer has a question or concern about the plea agreement".

Although some attorneys are disinclined to approach presentence writers, many agree that failure to do so is to the detriment of the client. In fact, some experts recommend that, at a minimum, defense attorneys escort their clients to the presentence interview. And, the American Bar Association standards go so far as to propose that in some cases it may be appropriate for the attorney to attend the interview with the defendant.[1]

Few public defenders are afforded the luxury to partake in such activity. Nevertheless, authorities consider it critical that some method of communication be established prior to the probation officer's development of a sentencing recommendation.* Although a telephone call may be the quickest and easiest method of approaching presentence investigators, many attorneys prefer to submit written sentencing memoranda. A word of caution to those who do, personal communication is usually more effective and provides an opportunity for an exchange of information.

Attorneys averse to approaching presentence investigators should consider two very important factors. The first is that PSI reports may have collateral consequences long after sentencing.[2] In most cases, a report follows the client as long as he or she is in the criminal justice system. They are used by probation officers to determine the intensity of supervision and by Department of Corrections officials to determine classification. Presentence reports significantly impact the supervising probation or parole officer's perception of the client. Therefore, they potentially can impact the way clients are treated and their ultimate success or failure on supervision. Equally important, presentence reports are used by judges, prosecutors, and parole board members during future court proceedings and parole eligibility hearings.

A second factor is that defense attorneys have the distinct ability to clarify issues including the legal status of the case, its facts, offense behavior, and overall circumstances. They are usually in the best position to provide factual information on a number of matters relevant to the presentence investigation.[3] In most cases, delaying the presentation of mitigation to the time of sentencing may have disastrous effects. By that time, a judge already may have made up his mind.

In short, sentencing advocacy is one of the most important responsibilities of a criminal defense attorney. Without it, earlier efforts can be forfeited during the sentencing process. To achieve the greatest success, counsel must educate their clients about the investigation process, prepare them to meet the presentence writer, and contact the presentence investigator before the report is developed. Successful sentencing advocates do have an impact on sentencing decisions.

* Note: The probation office advises that attorneys must communicate with the presentence investigator at least ten days prior to sentencing to ensure that comments will be included in the report. However, personal opinions about the client and the case are formed by presentence writers during the interview and can be the basis for many sentencing recommendations. Therefore, it is strongly recommended that contact be made as soon after the change of plea/verdict as possible.

**Endnotes:**

1. ABA Standards for Criminal Justice: Sentencing Alternatives & Procedures, Sec. 18-6.3(f)(c).

2. Honorable John L. Carroll, *The Defense Lawyers Role In The Sentencing Process: You've Got To Accentuate The Positive And Eliminate the Negative*, Mercer Law Review, Vol. 37, No. 3, Spring 1986.

3. Adapted from Benson B. Weintraub, The Role of Defense Counsel at Sentencing, Federal Probation Quarterly, 25 (March 1987).

## PRACTICE TIPS:

*Independent & Adequate State Grounds: The Plain Statement Rule*

Although not much activism abounds for finding more protections for our clients under our Arizona Constitution, practitioners should continue to cite it in all applicable motions.

For example, in a case where the Fourth Amendment is being cited for an illegal search of a client's home, provisions of Arizona's Constitution (art. II, sec. 8) have been interpreted more broadly. Likewise, any state statutes that the police may have failed to follow should be cited as additional authority prohibiting the state's unlawful acts. See, for example, A.R.S. Sec. 13-3912 (Grounds for Issuance of Search Warrant) or A.R.S. Sec. 13-3913 (Conditions Precedent to Issuance).

One area of which practitioners should stay aware is that a plain statement must be made of the independent and adequate state's grounds. It is not enough that the court consider and resolve all state law issues before reaching federal constitutional questions. In deciding state law issues, care must be taken that the court make clear by a plain statement in its judgment or opinion that the federal cases being used are for guidance only and they themselves do not compel the result the court has reached.

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*Local Practice Rules*

The Maricopa County Superior Court Local Rules are often overlooked. They are contained in Rule 4, Maricopa County Superior Court -- Local Rules.

Many of these rules can be cited as authority by the savvy practitioner to provide better advocacy for clients.

For example, if you want to have release reconsidered in a grand jury case prior to assignment to a trial division, Rule 4.4 provides that the presiding criminal judge shall hear such motions.

In obtaining an oral deposition, there are also special requirements. Rule 4.9 requires counsel for the moving party to personally request a stipulated order that has been refused by opposing counsel before having a hearing on a motion to compel deposition.

Another example is that Rule 4.11 requires that proposed voir dire be filed with the court at least 24 hours prior to the day set for trial.

*Making a Record for Jury Instructions*

Erroneous jury instructions are fertile ground for a successful appeal for our clients. However, an incomplete record often exists to help the client on appeal.

More often that not, jury instructions are discussed off-the-record. After that is completed, the trial judge than says that the parties will be given a chance to make a record. Trial attorneys should resist (better yet, as the slogan goes, "just say no") any off-the-record discussions about jury instructions.

The problem with conducting them off-the-record is that often the reasoning or even where the jury instruction came from take place in the off-the-record discussion. The on-the-record discussion rarely includes all the information necessary to help the client's appellate lawyer win the case.

*Probation Conditions Not in Writing*

A frequent occurrence in probation violations is based on an orally given regulation for the probationer. For example, the client is placed on probation for assault. Later, the probationer is told by the APO to attend the DOVE program or some other requirement. The probationer fails to complete the program and a petition to revoke probation is filed. The probation cannot be revoked for this violation alone.

Rule 27.1 of the Arizona Rules of Criminal Procedure give the probation officer the authority to impose regulations necessary to implement the conditions imposed by the court. The rule requires that all conditions and regulations be in writing and the probationer be provided with a copy. In *State v. Jones*, 163 Ariz. 498, 499, 788 P.2d 1249, 1250 (app. 1990), the Arizona Court of Appeals discussed the requirements of Rules 27.1 and 27.7(c)(2), Arizona Rules of Criminal Procedure, and held that an oral direction that an accused participate in a TASC drug counseling program that was not been reduced to writing could not serve as a basis for revoking probation. In *Jones* there was ample evidence that the probationer knew that he was to attend the TASC program and had in fact attended several sessions.

Care should always be taken that any admission is supported by the violation of a condition or regulation that has previously been provided to the client in writing.

*Programs for Clients in Jail*

Sometimes successful relations with our clients and sentencing advocacy can be accomplished by encouraging clients to participate in programs in jail. Some programs may help the client deal with the monotony of being locked up or the stress of not knowing what is going to happen to her. Others may help the client deal with a problem that led her to her present circumstances. Still others may help a sentencing judge see that the client used her incarceration time to her best advantage.

The following is a partial list of programs available in the Maricopa County Jail. A full listing may be obtained from the Training Division or your trial group supervisor. Clients may also be encouraged to contact the Inmate Services Division of the Maricopa County Jail.

* G.E.D. (General Educational Development):

For those who did not graduate from high school or already receive their G.E.D. (General Equivalency Diploma) certificate. Come and work toward achieving a certificate which is equal in value to a high school diploma. Request by tank order to Inmate Programs.

* Literacy Tutoring:

Available for those who desire help in learning to read better. Request by tank order to Inmate Programs.

* E.S.L. (English as a Second Language):

For those who speak a different language, and would like to learn to speak, read and write English. Request by tank order to Inmate Programs. (Available to medium and minimum security levels.)

* Anonymous Group Meetings:

Separate meetings for Alcoholics Anonymous and Narcotics Anonymous. Open to the unrestricted populations.

* Drug Group:

Intensive group therapy sessions for selected inmates who are serious about confronting their addictive behaviors. Request by tank order to Inmate Programs.

* Write Connection:

Workshops on how to write letters to your children while you are incarcerated. Request by tank order to Inmate Programs.

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*Out-of-State Witnesses*

Practitioners in our office who need to have a subpoena served on an out-of-state witness need to confer with the Chief Trial Deputy. Bob Guzik has become an expert on securing the attendance of out-of-state witnesses. Additionally, practitioners should be aware that Orders to Show Cause for Appearance of Out-of-State Witnesses will no longer be handled by the presiding criminal judge. Effective July 6, 1992, Judge Martin will handle petitions to secure the attendance of out-of-state witnesses and orders to show cause for individuals in Maricopa County ordered to appear as witnesses in other states.

*Unreasonable Delay in DUI Cases*

Practitioners may want to keep in mind that our supreme court's abandonment of *Hinson* does not foreclose all remedy. In *State v. Mendoza*, 103 Ariz. Adv. Rep. 8 (Filed Jan. 7, 1992) ___ Ariz. ___, 823 P.2d 51 (1992), our supreme court gave in to the prosecutor's failure to process DUI cases in a timely manner and abandoned the ruling in *Hinson* (DUI to be dismissed with prejudice if state does not bring accused to trial in 150 days). Although *Mendoza* overrules *Hinson*, the supreme court took care to point out that *Hinson's* predecessor, *Oshrin v. Coulter*, 149 Ariz. 109, 688 P.2d 1001 (1984), still provides a remedy to the accused. *Oshrin* states that "... if the delay between arrest and trial is so egregiously long that it violated due process, the DUI prosecution against the [accused] will be dismissed." Moreover, Rule 8 still remains a remedy for every case, including DUI prosecutions. Hence, in cases of "scratch and refile", the court made it clear that the *Oshrin* due process remedy still exists. Under *Oshrin*, the state's evidence against a defendant may be suppressed if the state's procedure results in "a denial of fundamental fairness shocking to a sense of justice and a denial of due process". 142 Ariz. at 111, 688 P.2d at 1003, citing *Brady v. Maryland* (citations omitted). For example, under present law, the state's destruction of a defendant's separate breath sample after telling him that his case is dismissed is a denial of fundamental fairness. *Oshrin*, 142 Ariz. at 111, 688 P.2d at 1003.

## Should Motions to Withdraw Be Ex Parte?

Introduction

A common problem for defense lawyers is figuring out what information to include in a motion to withdraw. Some careless defense lawyers file motions to withdraw divulging confidential information to the court, the prosecutor and subsequent counsel about their prior representation of former clients. This typically occurs when an alleged victim or witness is a former client. This information has the potential to harm the client and its divulgence is prohibited by the Rules of Professional Conduct. This article briefly discusses this issue and possible ways to avoid prejudicing former or present clients by safeguarding information through the use of an ex parte motion or confidential memorandum.

Background

The Sixth Amendment right to counsel guarantees an accused the right to be represented by counsel without conflicting interests or divided loyalty. Loyalty is an essential element in a lawyer's relationship to a client. Therefore, ethical rules prohibit any conflicts which could diminish or dilute the lawyer's loyalty and zeal in representing a client. Likewise, a lawyer cannot represent a client if the representation will be directly adverse to the interests of another client.

Client confidentiality is a part of the duty of loyalty to the client. Hence, "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation". Some defense lawyers, when filing motions to withdraw, fail to consider that the information they are divulging about former clients may violate their duty of loyalty to a client. Often, by naming a former client, in a large case with multiple civilian witnesses, they needlessly telegraph possible defenses and weaknesses in the case to the prosecution, thereby hampering new counsel's defense. More egregiously, where our office has represented a former client in juvenile court, divulging juvenile court records needlessly prejudices the former client and reveals information that is not public knowledge (although perhaps known to the prosecution -- but only perhaps!). Many prosecutors fail to properly evaluate former criminal histories; pointing it out to them only assists them in preparing their cases and prejudices the former client.

Confidential Memoranda

To remedy this situation, some defense attorneys file motions to withdraw with "confidential memoranda". The purpose is to tell the judge that there is a problem without revealing the former or present client confidences in order to obtain a ruling to withdraw. Once the motion is granted, defense counsel then requests the court to seal the motion to prevent the prosecutor from ascertaining why the office had a conflict in the case. This gives the former and present client some measure of protection against the prosecution's learning important information to the detriment of the client.

Avowal to Court

Alternatively, some defense counsel simply file motions avowing to the court that there is a conflict and requesting to withdraw (arguably, as officers of the court this should suffice!). This is particularly important in cases where the office may be pointing the finger at another client presently represented by a different attorney in the office but not charged in this offense. Divulging information in this situation would clearly be "giving up" the other client. It is information that even the court should not know.

(cont. on pg. 7)

Ex Parte Motions to Withdraw

Similar to the confidential memoranda is an ex parte motion to withdraw. The first issue in deciding whether to file an ex parte motion is to consider what stake the prosecution has in defense counsel's withdrawal from the case, especially where the reason for the withdrawal is because of confidential information. Some guidance can be found in Rodriguez v. State, 129 Ariz. 67, 628 P.2d 950 (1981). Rodriguez is the often cited case for the proposition that even the appearance of impropriety may be sufficient to grant a motion to withdraw. The case continues to be cited as authority in recent decisions on motions to withdraw.

A subsidiary issue in the case is whether the prosecutor's office had standing to disqualify defense counsel. Our supreme court, citing their prior opinion in Knapp v. Hardy, 111 Ariz. 107, 523 P.2d 1308 (1974), wrote that ". . . once indigency is determined the county attorney has no standing to object as to who will or will not represent the defendant or be associated as counsel." Further, the supreme court went on to write that ". . . for the prosecution to participate in the selection or rejection of its opposing counsel is unseemly if for no other reason than the distasteful impression which must be conveyed."

**"... once indigency is determined the county attorney has no standing to object as to who will or will not represent the defendant or be associated as counsel."**

This same argument may be applicable to all motions to withdraw from our office. There is no reason to involve prosecutors because they simply have no standing to object. There is no reason to wait for the response time of the prosecutor and the ex parte motion, which should later be sealed, provides a further measure of protection that the state will not uncover confidential or other information that could be used against a former or present client.

The motion should be captioned "Ex Parte Motion to Withdraw and to Appoint Counsel". After citing the appropriate authority and describing the conflict of interest without divulging the former or present client's identity, the motion should have a clause that reads as follows:

The prosecutor has no standing to object as to who will represent the accused. See, Rodriguez v. State, 129 Ariz. 67, 628 P.2d 950 (1981) (county attorney has no standing to object as to who will or will not represent the defendant or be associated as counsel). Therefore, the accused brings this motion ex parte and requests that it be sealed and that the reasons for the motion not be disclosed to the prosecutor.

Notice

An often overlooked aspect of motions to withdraw is that the client must be given notice (clients must always be advised of conflicts). ER 1.16(d). The better practice is to provide the client written notice of the motion prior to filing.

Conclusion

Whether ex parte, confidential memorandum or by avowal, defense counsel should take great care in drafting motions to withdraw to insure that client confidences are protected.

**Editor's Note:** Regardless of the reason for withdrawal, defense counsel must take all reasonable steps necessary to avoid prejudicing the client's rights and interests. ER 1.16(d). See, e.g., In re Everidge, 147 Ariz. 104, 708 P.2d 1295 (1985) (attorney disbarred for, among other things, abandoning representation without proper notice).

A checklist for conflicts should include, "immediately determine whether a conflict of interest is present". This should be one of the first entries in a case log. Most private firms run a conflict check before accepting the client or immediately thereafter.

If there is a conflict, the client should be provided notice. The best practice is to explain the problem to the client in person or by telephone so that she understands why we must get off the case and that her interests will be protected. Explaining to the client what will happen may help alleviate her fears about what is going to occur next.

Once the motion has been argued, pursuant to the above discussion, make sure that any confidential information is sealed so that the prosecution cannot obtain it -- at least through the defense. Also, extend the time for any motions, like a Rule 12.9, so that potential claims by the client are preserved. Motions for release or bond reduction, except in the most rare case, should be argued before withdrawal, since they will be unrelated to the conflict issue.

Determine from the court who the client's court-appointed lawyer will be. Pass the name of the new lawyer on to the client and explain to the client that it will take some time for court-appointed counsel to get up to speed on the case.

Call the new attorney and make arrangements to get the file to him/her as soon as possible. The file should include a copy of the indictment, all minute entries and discovery. Personal notes and case logs should always be retained in the file. Any information divulging the nature of the conflict that is not public record should also be protected. A cover letter transmitting the file to the new attorney should be drafted. A copy should also be retained in the client's file; while not absolutely necessary, this is the better practice. This leaves a record in the file for future attorneys to review in dealing with the same clients and is available to refresh the attorney's memory at any subsequent hearing, e.g., a Rule 32.

Lastly, close the file. **CJ ^**

**Editor's Note:** This motion is based upon one prepared by MCPD Robert W. Doyle. Mr. Doyle has participated on several State Bar committees on attorney discipline and recently addressed the State Bar Convention on professional conduct issues.

## SUPERIOR COURT OF ARIZONA

## MARICOPA COUNTY

| | |
|---|---|
| STATE OF ARIZONA, | |
| Plaintiff, | No. CR-* |
| v. | MOTION TO WITHDRAW AND CONFIDENTIAL MEMORANDUM |
| *, | (Assigned to the Honorable *) |
| Defendant. | |

The Maricopa County Public Defender's Office moves to withdraw from the representation of the accused because the office has a conflict of interest. This motion is supported by the attached Confidential Memorandum of Points and Authorities. The Confidential Memorandum is attached only to the court's copy of this motion in order to preserve the confidences of the client. See, Ethical Rule 1.6 (Confidences of Information).

DATED this _____ day of *, 199*.

DEAN TREBESCH
Maricopa County Public Defender

By_____
*
Deputy Public Defender

**Editor's Note:** This motion is based upon one prepared by Carmen L. Fischer, a court-appointed attorney for Maricopa County. Ms. Fischer was with the Maricopa County Public Defender's Office from 1985 until 1987.

## SUPERIOR COURT OF ARIZONA

## MARICOPA COUNTY

| | | |
|---|---|---|
| STATE OF ARIZONA, | ) | |
| | ) | No. CR-* |
| Plaintiff, | ) | |
| | ) | EX-PARTE MOTION TO |
| v. | ) | WITHDRAW |
| | ) | |
| *, | ) | (Assigned to the Honorable |
| | ) | *) |
| Defendant. | ) | |
| _____ | ) | |

Pursuant to Rules 1.6, 1.9 and 1.10, Arizona Rules of Professional Conduct, the Maricopa County Public Defender's Office moves the court to grant an order allowing it to withdraw from the representation of [name of client] because of a conflict of interest. This motion is brought ex-parte because the prosecutor has no standing to object and in order to insure that all confidences of present and former clients are protected. See, State v. Rodriguez, 129 Ariz. 67, 628 P.2d 950 (1981) (once indigency determined county attorney has no standing to object as to who will represent the accused); see also, ER 1.6 (confidentiality of information). It is further requested that this motion be sealed and that the reasons for the motion not be disclosed. This motion is further supported by the attached Memorandum.

DATED this _____ day of *, 199*.

DEAN TREBESCH
Maricopa County Public Defender

By_____
*
Deputy Public Defender

## Arizona Advanced Reports

**Volume 106**

*State v. Gottsfield*
106 Ariz. Adv. Rep. 32 (CA 1, 2/13/92)

The defense in a first-degree murder case moved to disqualify the prosecuting attorney's office. Defendant had previously been represented by an attorney whose partner was now a prosecutor. This particular prosecutor had no current connection to the case. At a hearing, the former attorney testified that he talked about the strengths and weaknesses of the witnesses in general with his former partner. The trial judge granted the motion to disqualify the prosecutor's office. The court of appeals finds that vicarious disqualification is not necessary. The general discussions concerning the witnesses was insufficient to require that the entire office be disqualified. No specific confidences were shared and the trial court did not consider alternative solutions less extreme than disqualification of an entire office. The record also reveals no actual prejudice resulting from a failure to completely disqualify the entire prosecution office. Given the size of the office, the fact that this prosecutor had no current contact with the case and no damage to the defense, the trial judge abused his discretion in disqualifying the entire office.

*State v. Batista*
106 Ariz. Adv. Rep. 52 (CA 2, 1/23/92)

Defendant was charged with several sex crimes against a child and faced a potential sentence of 90 years. Based upon an erroneous belief that consecutive sentences were impermissible, the parties stipulated that defendant's sentences would be concurrent if he were convicted and faced only 25 years. An eight-person jury heard the case and convicted the defendant.

Defendant now claims that he was denied his constitutional right to a 12-person jury. The parties were wrong that consecutive sentences were impermissible; consecutive sentences were mandatory under A.R.S. Sec. 13-604.01(J). However, the parties' stipulation in this case precluded the imposition of a greater sentence and the defendant's rights were not violated by the use of an eight-person jury.

Defendant argues that the prosecutor impermissibly struck a Hispanic person violating *Batson v. Kentucky*, 476 U.S. 79 (1986). In response, the prosecutor noted that the other Hispanics were not stricken. A *prima facia* showing of discrimination fails where some but not all similarly situated *venire* persons are not stricken. The prosecutor also gave race-neutral reasons for striking the *venire* person. The court disagrees with Division One's opinion in *State v. Boston*, 94 Ariz. Adv. Rep. 56, that the reasons given must be material to the case to be tried. The reasons given were sufficiently race neutral, even though they had no particular relation to the issues in the case.

*State v. Brewer*
106 Ariz. Adv. Rep. 3 (SC, 1/28/92)

Defendant was convicted of the first-degree murder of his girlfriend and sentenced to death. The defendant sought to dismiss his automatic appeal before the Arizona Supreme Court. The court declined to dismiss the appeal because of its statutory duty (appeal is mandatory in death penalty cases). The state also argued that the defendant waived review of all discretionary issues. The court notes that its duty is to review the death sentence imposed and to review both judgment and sentence for fundamental error. The court finds that neither the defendant's wish to waive his appeal nor the state's argument restricts the mandatory appeal called for by the statute.

Before allowing defendant to plead guilty, the court questioned the defendant concerning his competency. The defendant expressed his support for the death penalty for murder. The court, after considering the psychological reports and the defendant's demeanor and responses, accepted the defendant's plea of guilty. The defendant's desire to plead guilty in a death penalty case does not necessarily render him incompetent. The question is not whether the defendant acted in his own best interest but whether he possessed the ability to make a reasoned choice and to understand the consequences of his decision. While the defendant suffers from a borderline personality disorder, the psychiatric examiners found no evidence of a mental defect affecting competency. The trial judge applied the correct legal standard.

The prosecution recommended life in prison. Defendant claims it was ineffective assistance of counsel by not seeking a stipulated life-sentence agreement and by failing to object to the presentation of aggravating evidence. The state had previously refused to negotiate, defense counsel had no notice that the prosecutor would recommend life and defense counsel was in no position to block the state from presenting evidence in aggravation. The trial judge was not bound by the prosecutor's recommendation of a light sentence. Defense counsel was not ineffective.

In reviewing the death sentence, the court found that there was no grave risk of death to another person but that the murder was committed in an especially cruel and heinous manner. The record also contained sufficient aggravating evidence apart from the sentencing memoranda and presentence reports. In mitigation, defendant's personality disorder did not rise to the level of a statutory mitigating circumstance.

The state argues that the trial court erred in dismissing the charge of first-degree murder of the fetus. The fetal manslaughter statute, A.R.S. Sec. 13-1103(a)(5) precludes the state from prosecuting the defendant for the death of an unborn child under the homicide statutes.

(cont. on pg. 11)

*State v. Glad*
106 Ariz. Adv. Rep. 47 (CA 1, 2/18/92)

Defendant admitted violating his probation and was sentenced to prison. He argues that it was fundamental error for the trial court not to advise him that his admission could be used against him at trial on later charges. He claims that his admission prejudiced him by destroying any chance he had of defending against the subsequent prosecution. The trial judge erred by failing to comply with Rule 27.8(e). However, the record before the court does not fully support defendant's claim. If a defendant wishes to pursue relief, he must petition for post-conviction relief pursuant to Rule 32. The appeal is denied without prejudice to filing a petition for post-conviction relief.

*State v. Medina*
106 Ariz. Adv. Rep. 59 (CA 2, 2/13/92)

Defendant convinced several juveniles to transport a load of marijuana for him. During a stop, a policeman and one defendant were killed in a shootout. Defendant was charged with transportation of marijuana using minors, conspiracy and felony murder.

Defendant argues that the convictions for felony murder and using minors in a drug transaction are in error. There was sufficient evidence for the jury to infer that defendant knew that his accomplices were juveniles. Defendant also admitted he knew one was a juvenile. However, the felony murder charge must be reversed. A person is guilty of felony murder if that person commits a narcotics offense. While the definition of "narcotic drug" includes cannabis, it does not include marijuana. Because marijuana is not a narcotic drug, no narcotics offense occurred and the conviction for felony murder is set aside.

Defendant claims that only a single conspiracy was proved and that two conspiracy convictions were improper. The state agrees and the second conspiracy conviction is set aside.

Defendant claims that the prosecutor's striking four Hispanic jurors violates *Batson v. Kentucky*, 476 U.S. 79 (1986). The *Batson* objection was not made until after the jury had been sworn and the stricken jurors excused, waiving any error. The trial judge also expressly found that the prosecutor's strikes were not racially motivated. Division Two declines to follow *State v. Boston*, 94 Ariz. Adv. Rep. 56, and does not require that the prosecutorial reason advanced for striking a juror be related to the case.

*State v. Morris*
106 Ariz. Adv. Rep. 44 (CA 1, 2/18/92)

Defendant pled guilty to endangerment and agreed to pay the victim restitution not to exceed $3,500. The trial judge ordered defendant to pay restitution to the victim personally and to his insurance carrier.

Defendant claims that restitution to an insurance carrier is improper because they are not victims within the meaning of the statute. Victim includes the entities suffering the economic loss from defendant's criminal activity. Defendant also contends that his plea agreement shows that he only agreed to pay restitution to the victim and cannot be ordered to pay restitution to any other party. The insurance company is in the same position of economic loss as the named victim. The statutory scheme calls for restitution to any party who suffered an economic loss. Restitution to the insurance company is appropriate.

Defendant was ordered to pay damages including taxi fare, car rental and phone calls. The law allows restitution for economic losses but not for consequential damages. A defendant cannot be ordered to pay for losses that do not flow directly from the criminal activity. The restitution statute contemplates a requisite causal connection between the economic loss suffered by the victim and the defendant's conduct. Actual damages are the natural consequences of the defendant's conduct or those losses which are foreseeable. The expenses incurred would not have been but for the defendant's conduct. Basic necessities of life such as transportation are legitimate items for restitution.

*State v. Smith*
106 Ariz. Adv. Rep. 57 (CA 2, 2/13/92)

Defendant and a codefendant were charged with armed robbery and other offenses. The state requested that the defendants display the tatoos on their arms to the jury. The state argued that the display was relevant to explain why the defendants went to great lengths to cover their bodies during the robberies. The witnesses testified that the robbers were wearing long-sleeve shirts. They were unable to identify them. The defendants were ordered to show their tatoos to the jury. The evidence was relevant to identity and it explained why the robbers were so careful to cover themselves. Defendant has also failed to demonstrate any prejudice.

Defendants sought to impeach a state's witness with evidence of his conviction by court martial for false swearing and similar crimes. The trial court denied the motion because the court martial conviction was not yet final. There is a conviction in a court martial case when sentence has been adjudged. The conviction was final and was admissible for purposes of impeachment. Because this witness's credibility was central to the case, the error is not harmless and the conviction is reversed.

**Volume 110**

*Fitzgerald v. Superior Court*
110 Ariz. Adv. Rep. 80 (CA 1, 4/14/92)

Police executed a search warrant based on probable cause that they would find cocaine. Finding none, they seized some marijuana, Tylenol III, cash, two guns and drug paraphernalia. The state moved to forfeit the guns, cash and paraphernalia. The defendant was able to rebut the circumstantial evidence of wrongdoing, and the court ordered the items returned to defendant.

(cont. on pg. 12)

Four months later, defendant moved to dismiss the criminal action (four drug and weapons charges) based on double jeopardy and collateral estoppel. The state responded that forfeiture is civil so it is not an "acquittal" and alleged that the forfeiture court had no jurisdiction to try defendant's guilt or innocence because it is not an issue in fact that is actually litigated. The court denied the motion to dismiss and the accused filed a special action.

The court accepted special action jurisdiction. Double jeopardy protects against multiple prosecution and multiple punishment. Defendant is not claiming it is a multiple punishment case. To challenge multiple prosecutions, defendant must show a violation of either the "identical elements test" or "same conduct test". The court held that the prior forfeiture proceeding did not constitute a "prosecution" because in the forfeiture action the court did not have *in personam* jurisdiction. Since the defendant was not put to trial before the trier of facts, no jeopardy attached. Calling forfeiture proceedings quasi-criminal is done in the context of multiple punishment and only applies where the property is actually forfeited.

Defendant also contends that prosecution is now barred by collateral estoppel. The rule of collateral estoppel says that when an issue of ultimate fact has been once determined by a valid and final judgment, it cannot be relitigated between the same parties. To collaterally estop the state, defendant must show the same parties were involved, that the state had a full and fair opportunity to litigate, that the same issues of ultimate fact were involved and that the prior judgment was valid and final.

Defendant met these elements as to the possession of drug paraphernalia and weapons charges, but not the possession of marijuana and narcotic drug charges, since these issues were not litigated in the forfeiture proceeding. [Represented on special action petition by Karen M. Noble, MCPD.]

*State v. Martinez*
110 Ariz. Adv. Rep. 85 (CA 1, 4/15/92)

Defendant was indicted on three counts. The state alleged defendant was on probation when the offenses were committed and alleged prior felony convictions. The jury convicted defendant, but found he was not previously convicted of a felony. However, the court found defendant was on probation for a felony at the time he committed the offense and sentenced accordingly.

On appeal, the court held that a trial judge is not precluded from enhancing a sentence based on his finding that the defendant was on felony probation, even if a jury determines defendant had no prior felony convictions. The court rejected defendant's argument that twice putting at issue the status of his prior felony conviction violated double jeopardy. Further, A.R.S. Sec. 13-604.02(b) does not require a finding by the jury that defendant was on probation. Enhancement on that basis is more like an aggravating circumstance to be determined by the court, so consistency between the jury verdict and the judge's determination is not required.

*State v. Swanson*
110 Ariz. Adv. Rep. 88 (CA 1, 4/14/92)

Defendant was stopped for a traffic violation. Police noticed electronic paging equipment and a cellular phone. They asked defendant if he had any guns, drugs or large amounts of cash. Defendant said "no" and refused to sign a consent form, but gave verbal permission to "go in and look". The officers proceeded to search and in doing so removed the door panel. They found six kilograms of cocaine. The traffic stop was not a pretext and the defendant did give his consent to search the car. However, the trial court should have granted defendant's motion to suppress because the evidence was seized during a search that exceeded the scope of consent and was not otherwise supported by probable cause. The officers' reliance on a drug courier profile and other factors was insufficient in this case to expand mere suspicion into probable cause.

*State v. Flores*
110 Ariz. Adv. Rep. 116 (CA 2, 3/19/92)

Division Two of the Court of Appeals found that defendant's sentence was not cruel and unusual.

The Supreme Court orders that the Court of Appeals' opinion be depublished because the Court of Appeals misconstrued the holding in *Harmelin v. Michigan*, 111 S.Ct. 2680.

*State v. Arana*
110 Ariz. Adv. Rep. 116 (CA 2, 4/7/92)

Defendant pled guilty to a class 6 undesignated offense. The trial court left the offense undesignated and imposed three years probation with a $100 penalty under A.R.S. Sec. 13-812. Although A.R.S. Sec. 13-702(H) states the offense should be treated as a felony for all purposes until designated a misdemeanor, the court may not impose sanctions that exceed the statutory parameters for misdemeanors. The portion of the sentence imposing the $100 assessment is vacated.

**Volume 111**

*Hedlund v. Superior Court*
111 Ariz. Adv. Rep. 47 (CA 1, 4/27/92)

Two defendants were charged with first degree murder. The state sought the death penalty. The trial court ordered that dual juries be empaneled. Defendants filed a petition for special action.

*State v. Lambright*, 138 Ariz. 63 (1983) controls. *Lambright* prohibits the use of dual juries, absent approved guidelines. The Arizona Supreme Court has exclusive power to establish such guidelines, but has not done so. The Arizona Rules of Criminal Procedure do not authorize dual juries. Rule 39, which pertains to victims' rights, does not refer to dual juries.

(cont. on pg. 13)

The trial judge based his ruling upon the Victims' Bill of Rights. The Victims' Bill of Rights gives victims the right to speedy trial or disposition, but does not set forth procedures for enforcement of this right. In a recent civil case, the court indicated that it might re-examine *Lambright* in criminal cases. However, the Arizona Supreme Court has not re-examined *Lambright*, and the court now refuses to do so, particularly in capital cases.

*State v. City Court of the City of Tucson*
111 Ariz. Adv. Rep. 79 (CA 2, 4/30/92)

Defendant was charged with criminal damage and moved to dismiss, alleging lack of probable cause to arrest. The court set the motion for hearing and subpoenaed the alleged victim. The state moved to quash the subpoena, contending that the Victims' Bill of Rights precluded it.

The Victims' Bill of Rights does not give a victim the absolute right to avoid all pretrial contact with a defendant and his attorney. The Victims' Bill of Rights also does not permit a victim to refuse to appear or testify at pretrial hearings. However, A.R.S. Sec. 13-4434(C) provides that a victim need not testify as to "locating information" such as his address, telephone number or employer.

The subpoena was not simply a ruse to obtain discovery because pretrial hearings are not to be used for discovery purposes. While permitting the alleged victim to be subpoenaed to a pretrial hearing may allow a defendant access to certain pretrial discovery not otherwise obtainable, the court has the inherent power to ensure that the alleged victim is afforded the rights guaranteed by the Victims' Bill of Rights.

*State v. Brown*
111 Ariz. Adv. Rep. 67 (CA 2, 4/21/92)

The trial judge dismissed two forfeiture actions because the property was worth less than $5,000. The superior court does not have jurisdiction in forfeiture actions where the value of the property is $5,000 or less. A.R.S. Sec. 22-201(B) contains mandatory language divesting the superior court of jurisdiction in civil cases involving $5,000 or less. No other statute limits application of the clear, unambiguous, and comprehensive language in Sec. 22-201(B) to forfeiture actions, and it is not important that Sec. 22-201(B) does not mention forfeitures. A.R.S. Sec. 22-201(B) is not limited to cases where a money judgment is sought. A.R.S. Sec. 13-4302 permits forfeiture actions in superior court where the property is within the state or where the court has *in personam* jurisdiction over an owner or interest holder. However, this permissive language does not confer jurisdiction where the value is $5,000 or less. References to the superior court and its clerk in forfeiture statutes does not indicate intent to confer jurisdiction. Jurisdiction over this civil matter lies in the justice courts.

*State v. Bousley*
111 Ariz. Adv. Rep. 3 (SC, 4/16/92)

Defendant pled no contest to two counts of armed robbery. On appeal, he argued lack of factual bases. The basis for the first count was that defendant entered a Circle K store with his hand positioned under his clothing in a way that suggested a gun, demanded money and took cigarettes. The basis for the second count was that he entered another Circle K store, also with his hand under his clothing in a way that suggested a gun, and demanded that the clerk give him money or he would "blast" her. She gave him $100.

A defendant may be convicted of armed robbery under A.R.S. Sec. 13-1904 when he commits robbery while positioning a part of his body under his clothing in such a way that he appears to have a deadly weapon. This is enough to constitute a simulated deadly weapon. The facts presented adequate bases for the pleas.

The court distinguished *State v. Rodriguez*, 164 Ariz. 107, 791 P.2d 633 (1990), in which the defendant approached a cashier, kept her right hand out of sight, demanded money, and threatened to shoot the cashier. This did not constitute armed robbery because a simulated deadly weapon must actually be present. In *Rodriguez*, the defendant implied that she had a gun, but nothing resembling a weapon actually was present. [Represented on appeal by Carol A. Carrigan and Stephen R. Collins, MCPD.]

*State v. Clough*
111 Ariz. Adv. Rep. 28 (CA 1, 4/23/92)

(Reconsideration of State v. Clough, 92 Ariz. Adv. Rep. 35 (CA 1, 8/6/91).)

Defendant was convicted of burglary and theft of property in excess of $1,000. The state alleged a prior Montana conviction for issuing a bad check, a felony in that state, and also alleged that the defendant was on probation for the Montana offense at the time he committed these offenses in Arizona. On motion for reconsideration, Division One decided that defendant could not be sentenced as a repetitive offender. A.R.S. Sec. 13-604(I) requires sentencing courts to treat as prior offenses out-of-state crimes that would be felonies if committed in Arizona. However, there must be strict conformity between the elements of the out-of-state felony and the elements of some Arizona felony before A.R.S. Sec. 13-602(I) can apply.

Theft in Arizona does not correspond to passing a bad check in Montana. Issuing a bad check with the purpose of obtaining control over property or to secure property, labor or services of another in Montana does not equate with the unlawful control of another with the intent to deprive in Arizona. A.R.S. Sec. 13-1801(A)(4) requires that control of the property be of sufficient duration to destroy a substantial portion of its usefulness or enjoyment. Nothing in the Montana bad check statute suggests such a requirement. A person can commit the crime of issuing a bad check in Montana without engaging in conduct that would be a felony theft in Arizona.

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Issuing a bad check in Montana also does not correspond to the Arizona crime of fraudulent schemes and artifices for purposes of repetitive offender sentencing. The Arizona fraudulent schemes statute requires an intent to defraud and the Montana bad check statute does not. "Intent to defraud" as used in the Arizona fraudulent schemes statute means more than merely issuing a check knowing that at the time it is given there were insufficient funds in the bank to pay it. In *State v. Haas*, 138 Ariz. 413, 423, 675 P.2d 673, 683 (1983), the Arizona Supreme Court defined "scheme or artifice" as some "plan, device, or trick" to perpetrate a fraud. There is no reason to believe that "intent to defraud" means anything very different in Montana than it does in Arizona.

It was error to sentence defendant as a person on probation pursuant to A.R.S. Sec. 13-604.02(B) because A.R.S. Sec. 13-105(13) defines "felony" as an offense for which a sentence of imprisonment is authorized by any law of this state. It is not certain that one who was guilty of passing a bad check in Montana would necessarily have committed any felony in Arizona.

*State v. Cornell*
111 Ariz. Adv. Rep. 23 (CA 1, 4/21/92)

Defendant was convicted of aggravated assault and appealed. The court reversed and remanded because a juror looked up "aggravate" and "assault" in a home dictionary. The court of appeals could not conclude beyond a reasonable doubt that this extraneous evidence did not contribute to the verdict.

The trial court defined the crimes of aggravated assault and attempted aggravated assault in its instructions to the jury. Another instruction cautioned the jurors not to do their own research. The jury was unable to reach a verdict and was excused until the next day. The following morning, the juror returned with his dictionary. Defendant unsuccessfully moved for mistrial.

The juror had been a hold-out on the first day of deliberations because he could not decide if defendant was guilty of aggravated assault or attempted aggravated assault. He never considered a not guilty verdict. When the jury reached its verdict, this juror was the last to vote. The juror later testified that before he consulted the dictionary, he was confused about the instructions and undecided whether the defendant was guilty of aggravated assault. He stated that his reference to the dictionary "made" his decision that defendant was guilty of aggravated assault. This creates grave doubt that he followed the instructions. While he may not have influenced the other jurors in reaching their decision, unanimity was required to convict defendant, and the juror's conclusion may have been different had he not consulted extraneous sources. [Represented on appeal by Spencer D. Heffel, MCPD.]

*State v. Gatlin*
111 Ariz. Adv. Rep. 44 (CA 1, 4/23/92)

Defendant was charged with two counts of possession of a narcotic drug for sale and one count of possession of marijuana. He pled to one count of conspiracy to sell narcotic drugs and one count of possession of narcotic drugs. The plea agreement provided that there was no agreement as to sentencing except that if defendant was granted probation, he would be required to serve one year flat in jail. At sentencing, the court, with the acquiescence of the parties, ordered the 120-day shock incarceration program. Defendant failed to qualify for shock incarceration due to a medical disability. Defendant's probation terms were modified to require one year flat in jail. Defendant appealed.

The trial court could impose a sentence longer than shock therapy time. It was proper to modify the plea agreement because the shock incarceration order was expressly conditioned upon defendant's acceptance into that program. The plea agreement provided for modification if defendant should fail to qualify for or complete the shock incarceration program. Resentencing defendant to 120-days' jail time would also require the state's consent to modify the plea agreement.

*State v. Noble*
111 Ariz. Adv. Rep. 17 (SC, 4/21/92), State v. McCuin, 111 Ariz. Adv. Rep. 23 (SC, 4/21/92).

Defendants were separately convicted of various sex offenses. They were required to register as sex offenders pursuant to A.R.S. Sec. 13-3821. The underlying conduct occurred before the enactments of Sec. 13-3821, but defendants were convicted after the statute took effect.

Application of Sec. 13-3821 to defendants violates the ex post facto clause of the Arizona Constitution only if it is a law that changes the punishment, and inflicts a greater punishment than the law in effect when the crime was committed. The sole question is whether Sec. 13-3821 constitutes punishment. courts first ask whether the legislative aim was to punish, or whether the restriction comes about as a relevant incident to a regulation of a present situation. The relevant factors are whether the restriction (1) is an affirmative disability or restraint, (2) is historically regarded as punishment, (3) furthers traditional aims of punishment, and (4) is excessive in relation to a non-punitive purpose. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

Registration as a sex offender is not an affirmative disability or restraint because it does not affirmatively inhibit or restrain an offender's movement or activities. The registration requirement's marginal impact on the information available to non-law enforcement personnel is not the kind of affirmative disability or restraint usually associated with criminal punishment.

(cont. on pg. 15)

Registration traditionally has been viewed as punitive. However, provisions in the statute limiting access to the registration information significantly dampen its stigmatic effect. The registration requirement serves, at least in part, the traditional deterrent function of punishment. A convicted sex offender is less likely to commit a subsequent offense if his whereabouts are easily ascertained by law enforcement officials. Registration is not excessively burdensome in relation to the non-punitive purpose of facilitating law enforcement. Absent evidence linking a particular registrant to a crime sufficient to establish individualized reasonable suspicion or probably cause, a registrant could not be detained or arrested for questioning. At least with respect to the offenses involved in these appeals, child molestation and sexual misconduct with a minor, the registration requirement is not excessive.

A.R.S. Sec. 13-3821 has both punitive and regulatory effects. The most significant factor is facilitating the location of child sex offenders by law enforcement personnel, which is unrelated to punishment. The punitive aspects of the statute have been mitigated. The sex offender registration statute is regulatory rather than punitive in nature. Its retroactive application does not violate the ex post facto clause of the United States or Arizona Constitutions. [Represented on appeal by Carol A. Carrigan, MCPD.]

*State v. Pereida*
111 Ariz. Adv. Rep. 64 (CA 2, 1/23/92)

Defendant was convicted of transporting for sale or importing into this state marijuana weighing eight pounds or more. Evidence of defendant's financial condition was properly admitted. Evidence concerning the possession of large amounts of currency is admissible where the defendant is charged with a crime in which pecuniary gain is the motive. Evidence of unexplained wealth is relevant in a narcotics prosecution as evidence of illegal dealings and ill-gotten gains.

Defendant claims his attorney was ineffective for mishandling the issue of the defendant's finances. Defendant failed to establish ineffective assistance of trial counsel. Trial counsel did not consider the issue of the admissibility of defendant's finances, and an attorney certified as a criminal law specialist testified that this fell below professional standards and seriously prejudiced defendant's case. The trial court was free to reject the attorney's testimony.

The trial court properly admitted evidence of the condition of the van in which defendant was arrested. Police impounded the van and took photographs of it three-and-on-half months later. The jury knew of the time lapse. Any discrepancy in the van's condition goes to the weight of the evidence, not to its admissibility.

Defendant was fined over $275,000, including surcharges. Evidence of the value of the marijuana was sufficient for the court to determine the fine and surcharge. The state presented evidence that marijuana sold for $150 to $200 a pound in Mexico and that the price sometimes tripled when the marijuana entered Arizona. There also was testimony that marijuana sold for $600 a pound in Tucson and from $800 to $1,250 in Prescott. Defendant presented no evidence establishing a different price. No abuse of discretion occurred.

*State v. Thornton*
111 Ariz. Adv. Rep. 26 (CA 1, 4/21/92)

Defendant was arrested for aggravated DUI. After his Miranda warnings, defendant answered all questions with, "talk to my lawyer" and similar responses. Defendant then refused the breath test because his attorney was not present. The trial court held that dialogue occurring after the first time defendant said, "talk to my lawyer" and evidence of defendant's refusal to take the breath test were inadmissible. The court of appeals reversed.

Refusal to take a breath test generally is admissible because it is physical, not testimonial, evidence and as such is beyond the reach of the privilege against self-incrimination. The only exception in a criminal DUI case is where a defendant's right to counsel is denied. In this case, defendant testified that he did not receive a chance to make a phone call until the paperwork was completed. The officer testified that defendant was offered, but rejected, an opportunity to make a phone call after the first time he said, "talk to my lawyer". In any event, the officer did not deny a specific request to talk to a lawyer, and the defendant did not claim that the implied consent instructions led him to believe that consultation with an attorney was not allowed prior to the test.

Waiver of the right to counsel once invoked depends on the facts and circumstances of each case. The minimum required for invoking the right to counsel is a statement that shows a desire for an attorney during custodial interrogation. If the request is ambiguous, the police must cease questioning or attempt to clarify the request. In this case, there was no invocation of the right to counsel. Defendant did not refuse to answer questions and did not make a phone call. His "talk to my lawyer" remarks, taken in context, were an exercise in flippancy rather than a demand for a lawyer.

*State v. Young*
111 Ariz. Adv. Rep. 50 (CA 1, 4/28/92)

Defendant pled guilty to one count of theft. The charge arose out of losses incurred by a shoe store while defendant was its manager. Restitution was properly ordered based on estimates by an internal auditor for the store owner.

The auditor testified that the loss calculation was based on an inventory that showed shortages in four product areas. To each missing unit of inventory, the auditor assigned an average price value, since the inventory did not identify what items were actually missing. Nothing in the record indicated that this accounting method was speculative.

Although all stores in the shoe store chain incurred losses, the losses at defendant's store could be attributed to him. Defendant left some records of his fraudulent transactions and there was no evidence that any other employee of that store was stealing from it. All of the other employees confirmed defendant's fraudulent behavior.

(cont. on pg. 16)

Lost-profit restitution was properly ordered. Defendant admitted selling merchandise, pocketing the cash, and not recording the sale. The court presumed that these sales were made at retail price, thus depriving the victim of the profit. Restitution for these lost profits were not speculative.

**Editor's Note:** Because of the heavy caseload of Robert W. doyle (our appellate case editor), Suzanne Heiler and Jeanne Steiner prepared Arizona Advanced Reports Volumes 110 and 111. Anyone interested in assisting the newsletter staff in preparing Arizona Advanced Reports summaries, should contact the editor or Bob Doyle. The for The Defense newsletter staff greatly appreciate Bob's dedication to preparing these useful summaries.

## June Jury Trials

*May 26*

Larry Grant: Client charged with kidnapping, burglary and two counts of sexual assault. Trial before Commissioner Jones. Client found guilty of kidnapping; not guilty of burglary and one count of sexual assault; hung jury on second count of sexual assault. Prosecutor V. Imbordino.

*May 27*

Roland J. Steinle: Client charged with six counts of child molestation. Trial before Judge Portley ended June 04. Client found guilty on four counts and not guilty on two counts. Prosecutor A. Williams.

*June 01*

Darius M. Nickerson: Client charged with attempted murder. Trial before Judge Gottsfield. On June 09, second mistrial declared; on June 23, client found guilty of attempted manslaughter (dangerous). Prosecutor J. Garcia.

Timothy J. Ryan: Client charged with aggravated DUI and BAC of .10 or higher. Trial before Judge Hendrix ended June 03. Client found guilty. Prosecutor N. Miller.

Jeffrey L. Victor: Client charged with sexual assault. Trial before Judge Cole. Client found not guilty. Prosecutor J. Bernstein.

*June 02*

Daniel R. Raynak: Client charged with aggravated assault (dangerous). Trial before Commissioner Meyer ended June 09. Client found not guilty. Prosecutor J. Hoag.

*June 04*

James J. Haas: Client charged with sale of narcotic drugs. Trial before Judge Schwartz ended June 09. Client found guilty with prior. Prosecutor C. Richards.

Bruce F. Peterson: Client charged with second degree murder. (while on probation). Trial before Judge Sheldon ended June 17. Client found guilty of manslaughter (dangerous). Prosecutor D. Schlittner.

John Taradash: Client charged with aggravated assault. Trial before Judge Brown. Client found not guilty. Prosecutor J. Grimley.

James A. Wilson: Client charged with aggravated DUI. Trial before Judge Yarnell ended June 12. Client found not guilty. Prosecutor R. Nothwehr.

*June 09*

Stephen M.R. Rempe: Client charged with aggravated assault (dangerous). Trial before Judge Dougherty ended June 11. Client found not guilty. Prosecutor D. Palmer.

*June 10*

Dan Lowrance: Client charged with aggravated DUI (with priors; while on probation). Trial before Judge Noyes ended June 12. Client found not guilty. Prosecutor J. Burkholder.

James M. Likos: Client charged with sale of narcotic drugs. Trial before Judge Thompson ended June 12. Client found guilty. Prosecutor J. Wendell.

*June 11*

Thomas M. Timmer: Client charged with possession of narcotic drugs. Trial before Judge Brown ended June 16. Client found not guilty. Prosecutor M. Wales.

*June 15*

James M. Likos: Client charged with aggravated robbery. Trial before Judge D'Angelo ended June 19. Client found guilty. Prosecutor T. Doran.

Daniel R. Raynak: Client charged with aggravated assault (dangerous). Trial before Judge Hall ended June 23. Client found not guilty of aggravated assault and guilty of disorderly conduct. Prosecutor J. Rizer.

Louise Stark: Client charged with two counts of felony DUI. Trial before Judge Noyes ended June 16. Client found guilty. Prosecutor Z. Manjencich.

(cont. on pg. 17)

Roland J. Steinle: Client charged with offer to sell narcotic drugs and possession of narcotic drugs (2 kilos). Trial before Judge Katz ended June 20 with a hung jury. Prosecutor C. Smyer.

Raymond Vaca: Client charged with two counts of aggravated assault (dangerous). Trial before Judge Hendrix ended June 22. Client found guilty. Prosecutor T. Glow.

*June 16*

William A. Peterson: Client charged with sale of narcotic drugs. Trial before Judge Campbell. Client found not guilty. Prosecutor P. Davidon.

*June 17*

Rena P. Glitsos and Mark J. Berardoni: Client charged with sexual assault (with two priors). Trial before Judge Hotham ended June 19. Client found not guilty on all counts. Prosecutor D. Greer.

Larry Grant: Client charged with possession of narcotic drugs. Trial before Judge Gerber ended June 19. Client found guilty. Prosecutor L. Martin.

*June 18*

Daniel G. Sheperd: Client charged with DUI. Trial before Judge Noyes. Client found guilty. Prosecutor M. Spizzirri.

*June 22*

Paul J. Prato: Client charged with theft and trafficking in stolen property (with priors). Trial before Judge Howe ended in a mistrial June 19. Prosecutor S. Heckathorne. Note: Case retried June 30. Client found guilty on July 01. Client admitted one prior.

Leonard T. Whitfield: Client charged with theft (class 3). Trial before Judge Portley ended June 30. Client found not guilty. Prosecutor M. Barry. ^

## June Sentencing Advocacy

Pamela Davis, Client Services Coordinator: Client originally charged with class 3, dangerous aggravated assault. Client pled to aggravated assault, a class 6 non-dangerous, nonrepetitive offense. She had no prior felony convictions. The assault was on a police officer. The client was screened for long-term drug rehabilitation and was accepted for admittance at Amity one day following sentencing. She also attended G.E.D. classes, A.W.E.E. (Arizona Women's Education & Employment) and N.A. meetings in Durango Jail. On July 07, 1992, the client was sentenced to standard probation, one week additional jail. Attorney Timothy J. Agan.

Peggy Simpson, Client Services Coordinator: Client pled to attempted burglary, class 4, no agreements, no allegation of priors. He had four prior felony convictions and three prison sentences. Judge D'Angelo made it clear that he disagreed with the presentence recommendation and would sentence the client to prison. A mitigation hearing was held. The client had been screened and accepted into an intensive outpatient substance abuse program. He was also doing community service hours for a gang amnesty program. A sentencing proposal was submitted. Judge D'Angelo stated during the mitigation hearing that he had changed his mind. On June 12, 1992, the client was sentenced to I.P.S., no further jail. Attorney Reginald L. Cooke. ^

**Editor's Note:** The Client Services Coordinators (CSC's) started their work in our office in 1991. Their goal is to enhance the effectiveness of our attorneys by assisting them on sentencing issues. CSC's collect information and provide attorneys with expert guidance in the areas of treatment, rehabilitation and sentencing alternatives. They then devise sentencing plans for clients motivated to make positive changes in their lives. Attorneys present the plans to prosecutors, judges and probation officers to minimize jail and prison sentences. Some of the results of the CSCs' work are printed here and reflect their efforts and effectiveness.

## Training Calendar

*July 31*

The MCPD Office presents "The Courtroom, Real-Life Theater: An Attorney's Guide to an Actor's Tools" in the Training Facility from 1:30 p.m. until 3:30 p.m. This two-hour seminar will familiarize trial attorneys with some of the successful techniques professional actors use to convey and persuade audiences. Local professional actor, Fred Sugarman will conduct the seminar. Attendance is limited to 30 for this in-house presentation.

*August 14*

The MCPD Office presents "Appellate Writing Skills" in the Training Facility from 1:30 p.m. until 4:30 p.m. Professor Kathryn Harris of the Arizona State University English Department will conduct a writing seminar focusing on logical arrangement, structure, grammar and clarity in writing. Attendance is limited to 30 for this in-house presentation.

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*August 17*

The MCPD Training Division will begin three weeks of training for 5-7 newly hired attorneys for the office. Training will include an orientation, incorporating tours of the jail, correctional health services, the coroner's office, and Phoenix Police Department Crime Lab, as well as meeting with an APO pre-sentence writer, the head of our Appellate Division and other parts of the criminal justice system. Trainees will also have substantive lectures and demonstrations on the criminal code, plea negotiations, preliminary hearings, motion practice and client relations. Training culminates in the participants' production of a mock trial. The initial phase of new attorney training runs through September 4th.

*August 19*

The MCPD Office will present "Assertiveness in a Law Office: Becoming More Effective" for office support staff. Michael Tansy, M.C., a certified counselor and popular speaker, will discuss what assertiveness means and how to use assertiveness to be more effective in your job. The seminar will be held in our Training Facility from 9:00 a.m. to 11:00 a.m.

*September 15*

The MCPD Office will present "Legal Citations" for office support staff from 9:30 a.m. until 11:30 a.m. in the Training Facility. Christopher Johns will speak on basic cite training, researching legal issues and cases, proper citation of legal authority and other facets of paralegal skills.

*September 12 & 13*

AACJ presents "Creating Reasonable Doubt" on Saturday and Sunday at the Arizona Biltmore Hotel. This day-and-a-half seminar features nationally and locally known criminal defense attorneys including, Jim Kemper of our office, Michael Kimerer, Larry Debus, Tom Henze, Robert Hirsh, Larry Pozner and Juanita Brooks, as well as NACDL President Jeffrey Weiner. Forty attorneys from the office will be able to attend.

*September 25*

The MCPD Office presents "Client Relations". This half-day seminar will discuss issues relating to the successful representation of clients, including client communication, explaining plea negotiations, dealing with family members, handling client complaints, and enlisting the client's help in resolving the case. Presenters will include Emmet Ronan and other well-known criminal defense lawyers. Other speakers and location will be announced in future training calendars.

*October 09*

The MCPD Office will present a state-wide sponsored seminar on the Fourth Amendment and motions to suppress. Speakers and specific topics to be announced. Readers wishing to offer suggestions for topics and speakers are urged to contact the Maricopa County Public Defender's Office Training Director.

*October 21*

The MCPD Office presents "Legal Issues for Support Staff" from 9:00 a.m. to 11:00 a.m. in the Training Facility. Attorneys Mara Siegel and Christopher Johns will present important legal issues for support staff, including confidentiality, their roles as agents for attorneys, understanding basic legal issues, the limits of information they can give over the telephone and other related issues.

## Personnel Profiles

On August 17th, the following five attorneys will start working at our office.

Elizabeth Feldman has a B.A. in Politics from Brandeis University and a law degree from Arizona State University. In October of 1989, she was admitted to the State Bar of Arizona. From 1989 to 1991, Elizabeth worked as a law clerk for U.S. District Judge Robert Broomfield. She then became an associate with the firm of Brown & Bain, performing general commercial litigation. Elizabeth is the daughter of Arizona Supreme Court Chief Justice Stanley Feldman.

David Goldberg has an undergraduate degree in Business Administration from the University of Wisconsin and a law degree from Arizona State University. He has been admitted to the State Bars of Arizona and California. For approximately three years, David was an associate with the firm of O'Connor, Cavanagh, practicing criminal defense, insurance defense, personal injury and civil rights. Since March of this year he has been an associate with the firm of Allen, Kimerer & Lavelle handling criminal defense and plaintiff's civil rights matters.

Ray Schumacher has a BBA in Accounting from the University of North Dakota where he also earned his law degree. In May of 1991, he was admitted to the State Bar of Arizona. Prior to passing the bar, Ray served as Judge Patterson's bailiff and worked as a youth supervisor at the Maricopa County Juvenile Court Center in Mesa. Since July of 1991, Ray has served as Assistant Attorney General in the Child Support Enforcement litigation unit.

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Nina Stenson earned a B.S. in Nursing in 1985 and her law degree in December of 1991, both at Arizona State University. In May of this year she was admitted to the State Bar of Arizona. While in law school, Nina was a National Moot Court Team Member, and she participated in legal internships at the Arizona House of Representatives and U.S. Attorney's Office in South Dakota. Nina presently is working as bailiff and law clerk for Judge Dunevant.

Rickey Watson received his undergraduate degree in Political Science from the University of Albuquerque in 1986 and his law degree from Arizona State University. He was admitted to the State Bar of Arizona in January of this year. Before entering law school, Rickey was employed in a variety of criminal justice positions, including serving as a DOC parole officer and working as a groupworker at a juvenile detention facility. While in law school, Rickey was a legal intern for a semester at the Arizona State Senate. He currently is employed as a trial attorney with the Pinal County Public Defender's Office.

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In August, three new law clerks start work.

John Brisson earned a B.A. in Education at the University of Arizona in 1985 and his law degree at Arizona State University in May of this year. From August 1991 to January 1992, he worked as a law clerk (in an externship program) for Judge Earl Carrol, U.S. District Court. This year he participated in our externship program offered at ASU, interviewing and representing DUI clients in justice court. On August 3rd he will start work in Group D.

Ernesto Quesada, Jr. received a B.A. in Political Science at the University of Michigan and is pursuing his law degree at Arizona State University. In 1991, Ernesto participated in ASU's Indian Law Clinic as a law clerk and in ASU's Law School Clinic as an intern. He was also a participant this year in our externship program offered at ASU, representing DUI clients in pretrial conferences and trial preparation. Ernesto, who is fluent in Spanish, will be assigned to Group B starting August 24th.

Patricia Ramirez obtained a B.S. in Finance from Arizona State University in 1988 and is working on her law degree at the same university. Since 1977 she has worked full-time in the airline industry in customer relations. This year she served as an extern in our Juvenile Division in Mesa and in our externship program offered at ASU. On August 17th, Patricia (who is fluent in Spanish) will join Group A.

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Adieu to . . .

Anna Montoya who will be leaving our office on July 10th and moving to Nogales, Arizona

Terrie Walton who has accepted an attorney position in Upland, California and will be leaving on July 10th

a TEMPORARY Ciao to . . .

Anita Rosenthal who will take a leave of absence to travel in Europe and live in Spain from July 8th until January 1993.

## Duty of an Advocate

There are many whom it may be needful to remind, that an advocate -- by the sacred duty of his connection with his client -- knows, in the discharge of that office, but one person in the world -- that client and none other. To serve that client by all expedient means; to protect that client at all hazards and costs to all others (even the party already injured), and, amongst others, to himself, is the highest and most unquestioned of his duties. And he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any others. Nay, separating even the duties of a patriot from those of an advocate, he must go on, reckless of the consequences, if his fate should unhappily be to involve his country in confusion for his client.

Lord Henry Brougham (1778 - 1868)

*Lord Brougham was an English barrister, politician, attorney-general, chancellor, and acted as counsel for poor prisoners.*

## BULLETIN BOARD

Tour of Medical Examiner Facility

Many attorneys have expressed an interest in touring the Medical Examiner's Office to meet the personnel, observe how the office works, learn what medical/laboratory procedures are used, and see how reports are generated. In light of this interest, our Training Division has arranged two tours with Dr. Susan Plank of the Medical Examiner's Office, 120 South 6th Avenue.

On August 21st and on September 18th from 1:30 to 3:00 p.m., Dr. Plank will show our attorneys the facility. The number in each tour will be limited and registration deadlines are one week before each tour (i.e., August 14th and September 11th, respectively).

Any attorney who would like to attend either tour should contact Georgia Bohm at 506-8200.

**FIFTH AMENDMENT**

*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.*

## Yesterday . . . (Match the Past)

1. Slade Lawson (Group C)
2. Gerald Kaplan (JUV)
3. Carol Berry (Group B)
4. Bob Guzik (ADMIN)
5. Jim Kemper (Appeals)
6. Linda Williamson (Group A)
7. Rena Glitsos (Group D)
8. Tim Bein (Records)
9. Lucy Miranda (Support-A)
10. Brian Salata (Group C)

A. Pedalled 900 miles from Luxembourg to northern Italy on a coaster bicycle
B. Was grounded for 30 days by university dean for blowing up a dorm commode with a cherry bomb
C. Former Arizona Republic News Carrier of the Month
D. In the 3rd grade was their classroom's arm-wrestling champion
E. Worked way through law school as a disc jockey at radio station WBNS (Columbus, Ohio)
F. Was the Flavor Rich ice cream boy in television commercials with Ray Stevens
G. Leading hitter on their high school's softball team
H. Achieved a yellow belt in karate
I. Spent a summer demonstrating pineapple cutting techniques in grocery stores
J. At age 10 won national art contest sponsored by Cappy Dick

ANSWERS:

1.J; 2.E; 3.G; 4.B; 5.A; 6.D; 7.I; 8.C; 9.H; 10.F